IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 652 of 1990

with

CRIMINAL APPEAL No 790 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CRIMINAL APPEAL NO. 652 OF 1990 :

Chandrasinh @ Chandubha Lalubha .. Appellant

Versus

State of Gujarat .. Respondent

Appearance:

MR KB ANANDJIWALA for the Appellant (original accused No.2)

MR SN SHELAT, ADVOCATE GENERAL WITH
MR SUDANSHU S. PATEL, APP for Respondent - State

CRIMINAL APPEAL NO. 790 OF 1990

The State of Gujarat .. Appellant

Versus

1. Ajitsinh Andubha Parmar
2. Bharatsinh Andubha Parmar .. Respondents
(original accused Nos.1 & 3)

Appearance :

MR SN SHELAT, ADVOCATE GENERAL WITH
MR SUDANSHU S. PATEL, APP for Appellant - State

MR KB ANANDJIWALA for Respondent No. 1 & 2
(original accused Nos. 1 & 3)

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 06/07/2001

ORAL JUDGEMENT
(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. These two appeals arise from the judgement and order dated 17th July 1990 passed by the learned Additional Sessions Judge, Surendranagar in Sessions Case No. 56 of 1987, convicting the original accused No.2 Chandrasinh for the offence under section 302 of the Indian Penal Code and sentencing him to rigorous imprisonment for life and to pay a fine of Rs.2,000=00,

in default of which to undergo rigorous imprisonment for six months, and acquitting the original accused No.1 Ajitsinh Andubha and the original accused No.3 Bharatsinh Andubha for the offence under section 302 read with section 34 of the Indian Penal Code. There was Sessions Case No. 73 of 1987, clubbed with Sessions case No. 56 of 1987 in respect of the same incident. The original accused No.4 - Bakubha @ Ashoksinh Lalubha, who is the brother of the original accused No.2 - Chandrasinh was also tried and by the same judgement and order, original accused No.4 Bakubha @ Ashoksinh Lalubha was also acquitted for the offence under section 302 read with section 34 of the Indian Penal Code.

1.1 Criminal Appeal No. 652 of 1990 is preferred by the original accused No.2 - Chandrasinh against his conviction, while Criminal Appeal No. 790 of 1990 has been preferred by the State Government against the acquittal of the original accused Nos. 1 and 3 of the Sessions Case No. 56 of 1987. The acquittal of the original accused No.4 - Bakubha @ Ashoksinh Lalubha is not challenged.

2. The prosecution version was that a couple of days before the day of incident, there was some quarrel between Sahdevsinh, who was the younger brother of the deceased Gajubha and the original accused No.4 - Bakubha @ Ashoksinh, who was the younger brother of the original accused No.2 - Chandrasinh Lalubha. In that quarrel, Sahdevsinh was injured by a spade blow given to him by the original accused No.4. However, no complaint was filed in respect of that incident. On 14th May 1987 in the morning, while Abhesinh who was also the younger brother of Gajubha, was cleaning the `utara' (a place of tethering cattle as per the prosecution witnesses) which was near their house, the accused No.4 quarrelled with him and the father of the accused No.4, Andubha caught Abhesinh's hands from the back and the accused No.4 dealt a knife blow to him for which the FIR exh.55 was lodged by Abhesinh at Muli police station. The injured Abhesinh was then sent to the Muli Hospital and thereafter taken to Surendranagar Hospital for treatment by his father Manubha.

2.1 In the same morning, at about 10 o'clock, according to the prosecution, the accused Nos. 1 and 3 i.e. Ajitsinh and Bharatsinh, who are real brothers, and are the cousin brothers of the accused No.2 and the accused No.4, barged into the house of Gajubha and started beating his mother Mayaba who was dragged out of the house. At that time, Ranubha and his sister Harshaba

were present. Harshaba was also given a push. According to the prosecution, these two accused persons Ajitsinh and Bharatsinh assaulted Mayaba also with sticks causing her injuries, in respect of which, she was later on treated and medical certificate was issued.

2.2 While the accused Nos.1 and 3 started assaulting Mayaba, Ranubha rushed to their `utara' to call his brother Gajubha for help. Gajubha immediately started rushing towards his house which was only 200 feet away from the `utara' and when he came near a spot which is described as the rear of the house of Surubha (`Surubha Na Ghar Ni Pachhit'), and saw his mother being beaten, he shouted at the accused. At that juncture, the accused No.2 Chandrasinh emerged from the lane adjoining Surubha's house, took out a knife from a maroon coloured sheath and gave two knife blows, one on the chest and the other on the abdomen of Gajubha. On getting the knife blows, Gajubha started running back towards his `utara' and at that time, the accused Nos. 1 and 3 who were beating his mother left her and started chasing Gajubha with lathis in their hands. While Gajubha was running back to his `utara', he was given another knife blow near a spot which is described in the evidence as `Mataji's Madhi', which spot is, as per the map exh.37, one hundred feet away from the spot where the knife blows were first given to Gajubha by the accused No.2 near the house of Surubha. That earlier spot was about sixty-two feet away from the entrance of the house of Gajubha and his family. Even after inflicting a knife blow at the spot near `Mataji's Madh', these three accused continued to chase Gajubha, who fell down near his `utara', at which place the accused Nos. 1 and 3 had given stick blows to him on his head. According to the prosecution, Mayaba who was being beaten in that very street and Harshaba who was also with her had witnessed this incident. Ranubha who had gone to call Gajubha to help their mother, had also seen the incident.

2.3 Ranubha who was hardly 16 years of age at that time, tried to seek help when his brother Gajubha fell down due to the assault by these accused persons and witness Tejubha who had also seen the incident from a distance of 50 feet went and brought a bullet motorcycle alongwith Jambha and they carried Gajubha to the Civil Hospital. From there, the injured Gajubha was taken to Surendranagar in Mahatma Gandhi Hospital. At the Mahatma Gandhi Hospital, Surendranagar, Gajubha was examined by Dr. Wadher at 10.40 a.m. on that day. The statement of Gajubha was recorded as per exh.14 by the police at about 1.30 p.m. which ultimately become a dying declaration.

The Executive Magistrate was also summoned and he recorded his dying declaration exh.72 between 3.10 p.m. and 3.35 p.m. on 14-5-1987. In the evening, injured Gajubha was advised to be shifted to Ahmedabad and was brought to the V.S. Hospital, where he was admitted at 8.25 p.m. on 14-5-1987. Gajubha died on 18-5-1987 in the V.S. Hospital, Ahmedabad during treatment as a result of these injuries. According to the prosecution, Gajubha though seriously injured was fully conscious and in a position to give the dying declarations. He had also given an oral dying declaration before his father Manubha, who had come to the hospital after getting Mayaba treated for her injuries caused by the accused Nos. 1 and 3.

2.4 According to the prosecution, in all his dying declaration, Gajubha had stated that he was given knife blows by the accused No.2 - Chandrasinh and stick blows by the accused Nos. 1 and 3 i.e. Ajitsinh and Bharatsinh. As regards the accused No.4 - Ashoksinh, he had stated that the said accused tried to give him a knife blow, which however did not land on him.

2.5 The prosecution case further is that, from the spot where the accused No.2 - Chandrasinh had given two knife blows initially to Gajubha near the back side of the house of Surubha, blood stained sheath and a pair of chappals were recovered which ultimately were found to be having blood of group `O' which was of Gajubha. According to the prosecution, the knife was discovered at the instance of the accused No.2 and it was having blood stains on the blade. Moreover, from the spot where a further knife blow was inflicted by the accused No.2 on Gajubha while he was running back, near the `Mataji's Madh', blood stained scrappings were taken from the wall of the `Madh' which were found to be having the blood of `O' group, which was of Gajubha.

2.6 The prosecution has also relied upon the evidence of Puriba PW-2 who is residing in the same street near `Mataji's Madh' as an eye-witness who had seen one knife blow being inflicted by the accused No.2 on Gajubha and the accused Nos. 1 and 3 chasing him with lathis and also another neighbour Prannaba PW-7 who saw the accused No.2 giving two knife blows near Surubha's house and the accused No.1 and 3 with sticks.

2.7 The prosecution version, therefore, is that both from the ocular version as well as the dying declarations of Gajubha, it was established beyond doubt that the accused No.2 had inflicted knife injuries to Gajubha with

intention of causing his death and that the accused Nos. 1 and 3 had inflicted stick blows causing injury on his head and had shared his common intention of causing death of Gajubha.

3. In the Charge exh.3, it was alleged that all the four accused persons, in furtherance of their common intention of causing death of Gajubha and causing injuries to Mayaba, had entered the house of Gajubha and the accused No.2 - Chandrasinh @ Chandubha had inflicted knife blows on the chest and abdomen of Gajubha and the accused Nos. 1 and 3 had given stick blows to him, and thereby, they had intentionally caused his death and that they had committed an offence under section 452, 302 read with section 34 of the Indian Penal Code. All the accused were also charged for the offence under section 323 read with section 34 of the IPC as regards the injuries which were caused to Mayaba. In the alternative, each one of them was separately charged for the offences punishable under sections 452 and 302 of the Indian Penal Code. They were also charged for offence under section 302 read with section 114 of the IPC. Finally, they were charged for the offence under section 135 of the Bombay Police Act for committing breach of the notification prohibiting carrying of arms in public places.

4. The learned trial Judge, on the basis of the material on record, came to a finding that death of Gajubha was homicidal. It was held that the prosecution had proved that, on 14-5-1987, the accused No.2 Chandrasinh @ Chandubha had given knife blows to Gajubha. It was, however, held that it was not established that the other accused persons had common intention of causing death of Gajubha. The Court held that the prosecution did not establish that accused Ajitsinh and Bharatsinh had given stick blows to Mayaba and thereby committed offence under section 323 read with section 34 of the Indian Penal Code. The charge for the offence punishable under section 135 of the Bombay Police Act regarding the breach of the notification issued by the Collector was held as not proved. The trial Court found that Gajubha died a homicidal death which was caused due to injuries inflicted upon him, which were sufficient in the ordinary course of nature to cause death. The learned trial Judge while holding that it was established that the accused No.2 had inflicted knife blows on Gajubha, held that the dying declaration was silent about the incident that took place at his house where the accused Nos. 1 and 3 are said to have assaulted his mother Mayaba, and that it was also silent about his brother Ranubha having come to call

him and pursuant to that call, he having rushed towards his house to save his mother. The trial Court observed that the contradictions in the version of Mayaba and Harshaba were proved in the cross-examination through the investigating officer. Here, the trial Court overlooked the fact that there were two police statements of each of these eye witnesses, one recorded on 14-5-1987 and the other on 18-5-1987 by two different police officers. The P.S.I. Jhala who took over the investigation on 18-5-1987 when Gajubha died, had recorded further statements of the witnesses. The trial Court observed that, looking to the evidence of Ranubha, Puriba, Harshaba and Mayaba, the incident at home was not proved, because, there were material contradictions and omissions which go to the root of the case. This the trial Court has observed without specifying as to what type of material contradictions and omissions were there and without considering whether the omissions were material, as can be seen from paragraph 30 of the judgement where these observation occurs. The trial Court, however, accepted the version of the witnesses and as occurring in the dying declaration of Gajubha that Gajubha was assaulted and given knife blows by the accused No.2 Chandrasinh. The defence version that the only one incident had taken place and that was at 7.30 a.m. on 14-5-1987, and that while there was an altercation, the crowd had assaulted Gajubha by a knife, was rejected by the trial Court. The trial Court observed that it cannot be a mere coincidence that the slippers found from the scene of offence where the initial knife blows were given to Gajubha would fit the accused No.2, nor was it a mere coincidence that in the sheath which was found from that spot, muddamal knife could be fitted. The trial Court found that the accused Nos. 1 and 3 had sticks and the original accused No.4 tried to give a knife blow to Gajubha which did not cause any injury, but held that this was not sufficient for the Court to believe that all of them had assaulted Gajubha. It was held that the fact that the incident occurred during the daylight, ruled out the possibility of any mistake in identifying the assailants who were known persons. The trial Court, while convicting the accused No.2 for the offence under section 302 of the Indian Penal Code, observed that, "For rest of the accused, it is not that they are falsely involved but authorship of injury cannot be attributed to them." It was held that the prosecution had failed to prove that all other accused had acted in furtherance of common intention to murder Gajubha. The accused Nos. 1, 3 and 4 were, therefore, acquitted.

5. We have heard the learned counsel appearing for

both the sides in these two appeals at great length. It has been contended by the learned counsel appearing for the accused No.2 Chandrasinh @ Chandubha Lalubha, who is the appellant in Criminal Appeal No. 652 of 1990, and also for the original accused Nos. 1 and 3 (respondents of Criminal Appeal No.790 of 1990) that, having regard to the physical condition of Gajubha, who according to the medical evidence was gasping for breath due to leakage in his lung which was punctured by the stab wound, it would not have been possible for him to speak and therefore, the story that Gajubha had narrated the events in the dying declaration, cannot be accepted. Therefore, the earliest version which is said to be reflecting in the dying declaration exh.14 recorded around 1.30 p.m. on 14-5-1987 was doubtful. He submitted that the subsequent dying declaration exh.72, which was taken around 3.15 p.m. by the Executive Magistrate, was also doubtful for the same reason. The learned counsel further contended that there was a conflict between the version of Gajubha given in the dying declarations and the version of the eye-witnesses, as regards the origin, manner, sequence and place of the incident in which Gajubha is said to have been assaulted and injured. There is also conflict between these two versions as regards the part attributed to the accused persons. He submitted that the dying declarations in fact destroy the ocular version, because, there is no reference to the incident about the assault on the mother of Gajubha by the accused Nos. 1 and 3 and Ranubha going to Gajubha for help and Gajubha rushing to save his mother which was a version coming out from the eye-witnesses. He also submitted that, in the dying declarations, there was no reference to the assault that took place on Abhesinh, brother of Gajubha in the morning at 7.30 a.m. on that day by the accused No.4. He submitted that, in the dying declaration exh.14, Gajubha is said to have stated that he initiated the talk with the accused No.2 about the assault on his younger brother and there was a sudden attack by the accused No.2 which story was different from the version of the eye-witnesses who have said that when Gajubha was coming to save his mother and was near the spot described as rear (`pachhit') of the house of Surubha which was about sixty-two feet away from the house of Gajubha, the accused No.2 Chandrasinh had, at that time, emerged from the by-lane adjoining Surubha's house and gave two knife blows to Gajubha. It was further submitted that, in the dying declaration exh.72, Gajubha speaks about the incident having taken place near his `utara' and even in that dying declaration, Gajubha had not spoken about the incident of assault on his mother Mayaba and his rushing to save her on being called by his youngest brother

Ranubha. The learned counsel further argued that the conduct of the so called eye-witnesses does not inspire any confidence and that there were material contradictions and omissions in their version. The learned counsel referred to the contradictions and omissions brought out in the cross-examination of the First Grade Head Constable Tulsibhai in his deposition exh.58 had stated that Mayaba had not stated in her police statement that she was pulled by her hair by the accused Nos. 1 and 3, or that the accused Nos. 1 and 3 had sticks with which they had beaten her son Gajubha. He also referred to other contradictions and omissions in respect of other witnesses brought out in the cross-examination of this police witness. When it was pointed out to the learned counsel that these contradictions are with reference to the statements of these witnesses which were recorded on 14-5-1987 and they were not with reference to the further statements of these witnesses which were recorded by P.S.I. Navalsinh Zala on and after 18-5-1987 when he took over the investigation, as stated by him in his deposition exh.16, the learned counsel strongly contended that this Court cannot refer to the police statements (which are on record in the miscellaneous papers) of any witnesses for the purpose of ascertaining as to from which of the two statements the contradiction was put. He submitted that the appellate Court cannot look into the police statements for any purpose whatsoever. The learned counsel submitted that even such use of the police statement was not permissible by section 162 of the Criminal Procedure Code and this Court may read the evidence as it is, without referring to the police statements from which the contradictions / omissions were proved in the deposition of the investigating officers. The learned counsel for the accused persons further argued that in this case no motive was established which would have caused the accused No.2 Chandrasinh to assault Gajubha or the accused Nos. 1 and 3 to assault Mayaba. It was submitted that the accused No.2 - Chandrasinh never took part in the earlier incident which took place in the morning at 7.30 a.m. wherein his real brother Ashoksinh and his father Andubha are said to have assaulted Abhesinh, the younger brother of Gajubha. It was also submitted that no independent person from the locality was examined by the prosecution and only relatives of the injured were examined as eye-witness. It was submitted that some ingenious mind seems to have worked to fabricate false story for implicating all the members of the accused family. It was further argued that Mayaba was not corroborated by medical evidence regarding her version that she was pulled out of the

house by her hair by the accused Nos. 1 and 3. It was submitted that Ranubha did not give the names of the assailants to Rejubha whom he met in a few seconds after the incident and this created a doubt as to whether he had witnessed the incident. Moreover, when the history was recorded, the name of the accused No.2 Chandrasinh alone was disclosed to the doctor by some person from the crowd and it has come on record that one of the relatives of Manubha, father of the deceased was a police person named Lakhubha. It was, therefore, submitted that it was likely that Chandrasinh's name was roped in because of the quarrel between Abhesinh and Ajitsinh in the morning. He also submitted that the fact that the word `family' was written alongwith the name of Chandrasinh by the doctor in the history of the case given by a member from the crowd, shows that an attempt was made to implicate not only the accused No.2, but his other family members also, and this circumstance creates doubt over the prosecution story. The learned counsel finally contended that looking to the medical evidence, it appears that there were chances of Gajubha's survival if complications had not occurred due to the injuries suffered by him and proper medical treatment was given. He submitted that the immediate cause of death was not injury and the accused could have lived with one lung even if the lung which was punctured was removed. He, therefore, submitted that the accused cannot be held guilty for the offence of murder, because, the death could have been averted with proper treatment. It was also submitted that the contused lacerated wound on the head was initially described by the earlier doctor as an incised wound. It was contended that an incised wound would be caused by a sharp cutting instrument like knife and therefore, the story that a stick blow was given on the head of Gajubha by the accused Nos. 1 and 3 cannot be accepted, as a stick blow cannot cause an incised wound.

5.1 The learned counsel for all the accused persons in these two appeals cited the following decisions in support of his contentions :

[a] The decision of the Supreme Court in Harchand Singh v. State of Haryana reported in AIR 1974 SC 344 was cited for the proposition that where one set of evidence condemned the other set, the Court was left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. In that case, the prosecution led two sets of evidence, each one of which contradicted the other.

[b] The decision in case of State of U.P. v. Madan Mohan reported in AIR 1989 SC 1519 was cited to point out that where the prosecution version regarding the incident as stated by the two eye-witnesses materially differed from the version unfolded by the dying declaration, the acquittal of the accused was confirmed. In that case, the Supreme Court on the basis of the material on record held that the prosecution had suppressed the genesis of the crime and no witness from the locality whose presence would be natural were examined which created a doubt regarding the truth of the prosecution version. The decision of the Calcutta High Court in Jugal Kishore Laha v. State, reported in 1984 Cr.L.J. 360 was also cited for similar proposition.

[c] The decision in case of Babu v. State of Uttar Pradesh, reported in AIR 1983 SC 308 was cited for the time honoured proposition that in appeal against acquittal if two views are possible, the appellate Court should not interfere with the conclusions arrived at by the trial Court unless the conclusions are not possible. It was held that if the finding reached by the trial Judge cannot be said to be unreasonable, the appellate Court should not disturb it even if it was possible to reach a different conclusion on the basis of material on the record, because, the trial Judge has the advantage of seeing and hearing the witnesses and the initial presumption of innocence in favour of the accused is not weakened by his acquittal. The appellate Court, therefore, should be slow in disturbing the finding of fact of the trial Court and if two views are reasonably possible on the evidence on the record, it is not expected to interfere simply because it feels that it would have taken a different view if the case had been tried by it. The learned counsel also cited in respect of the same proposition the decisions in case of (1) Solanki Chimanbhai Ukabhai v. State of Gujarat, reported in AIR 1983 SC 484 and, (2) Ram Kumar v. State of Haryana, reported in AIR 1995 SC 280. The decision of the Supreme Court in case of Ajit Savant Majagvai v. State of Karnataka, reported in 1997 SCC (Cri.) 992 was cited for pointing out the principles reiterated therein which would govern and regulate the hearing of an appeal by the High Court against the order of acquittal.

6. The learned Additional Public Prosecutor submitted that the evidence on record clearly established beyond any reasonable doubt that all the three accused had acted in a concerted manner when in the morning of 14th May 1987, after the earlier incident which took place at 7.30 a.m. in which there was a quarrel between Ajitsinh, brother of Gajubha and Abhesinh, brother of the accused No.2, the accused Nos. 1 and 3 around ten o'clock went to the house of Gajubha and dragged out his mother Mayaba of the house and assaulted her and while Gajubha who was called by Ranubha for help, was proceeding on that street, the accused No.2 who must have been waiting in the lane with a knife, inflicted two knife blows on Gajubha and when Gajubha started to run back, the accused Nos. 1 and 3, armed with sticks, also chased him alongwith the accused No.2 who gave him a further knife blow and the accused Nos. 1 and 3 gave stick blows, causing the head injury to him. It was submitted that there was ample time and opportunity to these three accused persons to have shared the common intention of going to the house of Gajubha for the purpose of the murderous assault and the motive was clearly the quarrel in the early morning between Ajitsinh, younger brother of Gajubha and Abhesinh, younger brother of the accused No.2. It was submitted that even though Gajubha tried to escape by running away after he was given initial knife blows by the accused No.2, all the three accused persons acted in an unusual and cruel manner by pursuing and giving him further blows, as a result of which ultimately he died on 18-5-1987. It was submitted that mere possibility that by some treatment of removing one lung, Gajubha may have survived, the rigor of the offence was not reduced. The learned Additional Public Prosecutor further argued that the dying declarations were implicitly reliable, because, as per the medical evidence, the injured Gajubha was conscious. The first dying declaration exh.14 was recorded on the same day at 1.30 p.m., while the other also on the same day by the Executive Magistrate at 3.15 p.m. and the names of all the four accused figured therein. There was clear reference in the dying declarations to the knife blows given by the accused No.2 to Gajubha and the stick blows given by the accused Nos. 1 and 3. It was submitted that, if at all Gajubha wanted to falsely implicate anyone, he would not have stated in his dying declaration that the knife blow which was aimed at him by the accused No.4 had missed him. The learned Additional Public Prosecutor, referring to the deposition of witnesses, submitted that the presence of Mayaba, Harshaba and Ranubha was natural and there was no reason to doubt that they had witnessed the incident. It was

submitted that mere omissions of insignificant nature cannot be used for rejecting their direct evidence. The learned A.P.P. also submitted that some omissions were brought on record only in the context of the statements which were recorded on 14-5-1987 and that the learned trial Judge had overlooked the fact that the omissions or contradictions which were proved from the evidence of the investigating officer were only in context of the statements of these witnesses which were recorded on 14-5-1987, and that even these insignificant contradictions and omissions were not there in the subsequent statements of these witnesses, because, no such contradictions or omissions were brought on record in the context of the further statements which were recorded on 18-5-1987 by the investigating officer, who took over the investigation on 18-5-1987 when Gajubha died. It was submitted that the trial Court had not examined the aspect that none of the contradictions or omissions can be said to be material. They were insignificant omissions and contradictions which would occur in the depositions of the witnesses who are telling the truth. The learned counsel, therefore, submitted that there was no warrant to interfere with the conviction of the accused No.2 Chandrasinh, and that since the guilt of the accused Nos. 1 and 3 was also established beyond any reasonable doubt from the record of the case, the State appeal against their acquittal deserves to be allowed and they ought to be convicted for the offence under section 302 read with section 34 of the Indian Penal Code for having shared the common intention of causing death of Gajubha with the accused No.2.

6.1 The learned Additional Public Prosecutor cited the following decisions in support of his contentions :

[a] The decision of the Supreme Court in Makan Jivan v. The State of Gujarat, reported in 1971 (3) SCC 297 was cited for the proposition that where witness states that he had signed his statement or put a thumb mark in his statement made during investigation, it is the duty of the trial Court to clear this point by questioning the investigating officer and by looking into relevant record whether the witness had actually signed his statement or not.

[b] The decision of the Supreme Court in Sham Sunder v. Puran, reported in AIR 1991 SC 8 was cited for the proposition that the powers of the High Court under section 386 of the Criminal Procedure Code in any appeal in dealing with evidence are

as wide as that of the trial Court. It was held that, as the final Court of facts, the High Court has also a duty to examine the evidence and arrive at its own conclusion as to the guilt or otherwise of the appellants before it.

7. The learned Advocate General, addressing the Court on the question as to whether the appellate Court can refer to the police statements which are on record for the purpose of ascertaining as to whether the contradiction or omission was correctly brought on record in the evidence of witnesses, submitted that the extreme proposition canvassed on behalf of the accused persons that the appellate Court can under no circumstance refer to the police statements which have been used at the trial and from which, part of the statement is duly proved at the trial in the contradictions was not warranted. He submitted that when omission to be brought on record is to be ascertained, necessarily the entire statement has to be viewed to find out whether the omission existed or not. The learned Advocate General argued that whatever the trial Court can do with regard to the police statements, the appellate Court also can do.

7.1 The learned Advocate General referred to the following decisions in support of his contentions :-

[a] State of Madhya Pradesh v. Kalu Kachru Keer, reported in AIR 1959 M.P. 391, a decision of a Division Bench was cited to point out that the Court held in context of the provision of section 145 of the Evidence Act and section 162 of the Criminal Procedure Code that, the only use to which any part of the statement made by the witness to the police and recorded in the police diary can be put to is to contradict the witnesses called for the prosecution with regard to what he states in Court. If what is said in the police statement is either reconciled by explanation offered by the witness in his examination in Court or is reconcilable apart from the explanation, there is no contradiction. It was held that before the contradictory statement can be used as evidence against the prosecution and also to discredit the witness, the attention of the witness has to be called to that particular part and his explanation sought. It, therefore, follows that calling attention to the whole of that statement and showing that the contradictory portion does not exist is not

enough. What is necessary to put the witness is what he actually stated to the police with regard to the particular detail of the incident and what he stated in Court. When these two statements are either not reconciled by the explanation offered by the witness or are irreconcilable, then contradiction may be said to exist. It was pointed out from para 21 of the judgement that the Court held that, where the contradictory statement in the police diary is something positive, that is where there is direct contradiction between what is said to the police and is said in court, the proof has to be confined to particular part of the contradictory statement of the witnesses in the police diary, but where contradiction consists in omission, the said omission can be proved either by bringing on record the whole of the statement, confining its use to the actual absence of the statement made in Court, or, the police officer might be told to refer to the police statement of the witness for refreshing his memory and asked whether such statement had been made.

[b] In Nareshkumar Kikabhai Tandel v. The State of Gujarat, reported in 1984 G.L.H. 233, a decision of a Division Bench of this Court, which was also in context of the provision of section 145 of the Indian Evidence Act and section 162 of the Criminal Procedure Code, it was held that it was necessary that in every case where the witness is to be contradicted, the Judge should bear in mind these two provisions. In light of the principles enunciated in Tahsildarsingh v. State of U.P. reported in AIR 1959 SC 1012 and Ismail Bijalbhai v. The State of Gujarat reported in 8 G.L.R. 25 (DB), it was held that omission will not amount to contradiction unless it vitally touches the very factum which is required to be proved by the prosecution. The Division Bench of this Court cited the observation of the earlier Division Bench in Ismail Bijalbhai (supra) in which it was held that when an omission from a statement before the police is brought on record in the cross-examination of a particular witness, it becomes obligatory on the public prosecutor and if the public prosecutor fails to carry out that duty, it becomes obligatory to the Court to put question to the witness and to bring on record under the powers under section 162 of the Cr.P.C. as to what the witness actually stated to the

police. It was held that it is for the trial Judge to decide in each case, after comparing the part or parts of the statement recorded by the police with that made in the witness box to give ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfied the requirements of law. The Division Bench also quoted the ratio of the decision in Tahsildarsingh's case (supra) that section 162 of the Code was conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction.

[c] The decision in State of Kerala v. Babu, reported in AIR 1999 SC 2161 which is also in context of the provisions of sections 161 and 162 of the Cr.P.C. and section 145 of the Evidence Act, was cited to point out that it was held therein that it is the right of a party in a trial to use the previous statements of a witness either for the purpose of establishing a contradiction in his evidence or for the purpose of impeaching the credit of the witness and this right given to a party in a trial under section 145 of the Evidence Act is somewhat controlled in criminal trials by the provisions made in the Code. The Supreme Court held that, on a reading of section 162 of the Code bearing in mind the object of the said section and section 145 of the Evidence Act, it is clear that an accused in a criminal trial has the right to make use of the previous statements of a witness including the statements recorded by the investigating agency during the course of an investigation for the purpose of establishing a contradiction in the evidence of a witness or to discredit the witness.

8. The record establishes without any dispute that the accused Nos. 1 and 3, Ajitsinh and Bharatsinh, are the real brothers and that the accused No.2 - Chandrasinh @ Chandubha Lalubha is the real brother of the original accused No.4 - Bakubha @ Ashoksinh Lalubha. Accused Nos. 1 and 3 are the cousin brothers of the accused Nos.2 and

4. All these accused were distantly related with Gajubha and his family. A couple of days prior to the date of incident which took place on 14-5-1987, there was a quarrel between Sukhdevsinh and the original accused No.4 - Ashoksinh and during that time, the accused No.4 had given a spade blow to Sukhdevsinh. However, no complaints were filed. Manubha has deposed about this incident in his deposition exh.28. The original accused No.4, in his statement under section 313 of the Code, in reply to question No.12, had stated that two days prior to the date of incident, there was a quarrel between him and Sukhdevsinh and that, Sukhdevsinh had beaten him with spade and he had tried to defend himself with spade and in that process, he had injured Sukhdevsinh with spade. He had further stated that two days after that (i.e. on 14th May 1987), when the accused No.4 was proceedings to his `utara', Abhesinh and Gajubha had come near him and Abhesinh pressed his neck and Gajubha was having a knife, but the people who gathered had saved him and he does not know as to who had injured Gajubha. He had stated that the said incident had occurred at 7 o'clock in the morning. Manubha, father of Gajubha, in his deposition exh.28 has stated that, on 14-5-1987 in the morning at about 7 o'clock, while he was proceeding towards his `utara', he heard some commotion and saw that his second son Abhesinh was standing near the door of the `utara', profusely bleeding. He therefore asked him as to what had happened and was told that Anadubha i.e. father of the accused Nos. 1 and 3 had caught him by his hand and the accused No.4 Ashoksinh @ Bakubha had given him a knife blow. This witness, therefore, took his son Abhesinh to the police station at Muli for lodging the F.I.R. Thereafter, Abhesinh was taken to the Surendranagar Hospital and this witness, after collecting money from his house, also proceeded to Surendranagar and reached there at about 9.30 a.m. Abhesinh, in his deposition exh.55, has stated that he had lodged the F.I.R. exh.54 about the incident that took place in the morning of 14-5-1987 around 7.00 to 7.30 a.m. He has stated that, while he was sweeping near his `utara', the accused No.4 had started abusing him and had taken out a knife and given him a blow. Anadubha, father of the accused No.4 was also there. He has denied the suggestion that he and his brother Gajubha had tried to beat the accused No.4 - Ashoksinh or that Gajubha was trying to give a knife blow to Ashoksinh. He has also denied the suggestion that the people had gathered there and with a view to save Ashoksinh, they had assaulted his brother Gajubha. In the F.I.R. exh.55, which was in respect of the incident that took place at 7.30 a.m. on 14-5-1987, the accused No.4 - Ashoksinh Lalubha and

Anadubha, father of the accused Nos. 1 and 3 were named as the accused persons with an allegation that the complainant Abhesinh Manubha was given knife blows by the accused No.4 Ashoksinh Lalubha, while Anadubha had held his hands from the back.

8.1 The injury certificate of Abhesinh is at exh. 34 and is proved in the deposition exh.29 of Dr. Devajibhai Khimajibhai Wadher. This medical evidence shows that, on 14-5-1987, Dr. D.K. Wadher had examined Abhesinh at 9.25 p.m. at M.G.S. Hospital, Surendranagar and he noted an incised wound on his right posterior auxiliary fold of the size 3" x 1/2" and an incised wound on left first wab dorsally, of the size 1" x 1/4".

8.2 Witness Ranubha at exh.11 also referred to the incident that took place at 7.30 in the morning of 14-5-1987 in which is brother Abhesinh was given knife blows by the accused No.4 while his hands were held from the back by Anadubha, father of the accused No.1 and 3. Even Mayaba in her deposition exh. 21 has spoken about that incident and to the fact that her son Abhesinh was taken to the Surendranagar Hospital for treatment after he was injured in the morning on the day of the incident.

8.3 Thus, on 14-5-1987, one incident had taken place in the morning at 7.30 a.m. in which Abhesinh, the younger brother of Gajubha was injured by a knife blow given by the accused No.4 while Abhesinh was being held by Anadubha, father of the accused Nos. 1 and 3, as per the prosecution version. Two days before that, an incident occurred in which the accused No.4 is said to have given a spade blow to Sukhdevsinh who was also the younger brother of Gajubha. It would, thus, appear that the relationship between the accused persons on one side and the brothers of Gajubha on the other, was estranged. Gajubha was the eldest of the four brothers. The incident that followed at 10 o'clock on 14-5-1987 is to be viewed in this background. From the evidence on record, it appears that there is absolutely no substance in the defence version tried to be put up at the trial that Gajubha was beaten by members of the crowd in the morning at 7.30 a.m. when he was trying to assault the accused No.4.

9. Coming to the main incident that took place around 10 o'clock in the morning of 14-5-1987, we find from the deposition of Ranubha that, at 10 o'clock while he, his mother Mayaba and his sister Harshaba were sitting in the falia of their house, and his mother was

weeping, at that time (presumably because of the incident that had taken place in the morning at 7.30 a.m. in which her son Abhesinh was injured and taken to the hospital), the accused No.1 - Ajitsinh Anadubha had come and pushed open the gate of the `Deli' and started abusing his mother. They gave her fist and kick blows and dragged her out of the `Deli'. The accused No.3 Bharatsinh had brought the sticks. When Harshaba tried to intervene, she was given a push as a result of which she fell down. This witness therefore rushed to the `utara', which is about 200 feet away from his house, to call his brother Gajubha. He told Gajubha that their mother was being beaten and that he should come. Thereupon, Gajubha went with him but ahead of him. Gajubha told the accused as to why they were beating his mother and at that time the accused No.2 Chandrasinh came out from the lane of Surabha's house with a knife and he gave knife blows on the chest and the waist of Gajubha. Thereupon, Gajubha started running back towards the `utara'. The accused No.2 - Chandrasinh chased him. The accused Nos. 1 and 3, Ajitsinh and Bharatsinh had also run after Gajubha, leaving his mother. The accused No.4 also started running. When Gajubha reached near `Mataji's Madh', the accused persons had overtaken him and the accused No.2 Chandubha gave a knife blow in the abdomen of Gajubha, who fell down while going towards the `utara'. At that time, accused Nos. 1 and 3 had given stick blows on the head of Gajubha. This witness, therefore, started running away and at the corner of that locality, which is known as `Naranpa', he met Tejubha whom he spoke about the incident and when he and Tejubha came near their brother, all the accused had run away. At that time, one Ajitsinh Nanubha had also come. Thereafter, Tejubha and Jambha took Gajubha on a motor cycle to the hospital. This witness has stated that even Puriba who resides in that street had seen the incident. He has stated that his brother was taken to Surendranagar and thereafter to Ahmedabad where he died after four days. He has stated that the police recorded his two statements. In his cross-examination, he has denied that his family members were angry on the accused No.4, because, two days back, the accused No.4 had given a spade blow on the head of his brother Sukhdevsinh which had caused injury which required to be sutured. He has stated that, at the time of giving deposition, he was 19 years of age, which means he was 16 years of age when the incident had occurred, three years before his deposition. He has admitted that he had not stated in the police statement that sticks were brought at the time when his mother was being beaten, but had stated that at that time, the accused Nos. 1 and 3 were having sticks. He

has denied that no injury by stick was caused to Gajubha. He has admitted that, in his statement dated 14-5-1987, he has not stated that Harshaba was pushed down. He has denied that he did not know from which direction Chandubha came. He has admitted that, in his statement of 14-5-1987, he had not stated that Chandubha had come from the lane. He has denied the suggestion that in the morning while the accused No.4 was going towards his `utara', his brothers Abhesinh and Gajubha who were at their `utara' had attacked the accused No.4 and pressed his neck. He has denied that at that time, people had gathered and for saving the accused No.4, they had given blows to Gajubha. He has denied that no incident had occurred at 10 o'clock. Barring minor and insignificant contradictions, nothing is brought out in the cross-examination of this witness which can throw any doubt over his version that at 10 o'clock while they were sitting in the falia their house. the accused Nos. 1 and 3 had come there and had started abusing his mother who was dragged out of the house in the street. His conduct of rushing to call his eldest brother Gajubha was quite natural. Gajubha was at the `utara' and as per the map exh.37, the `utara' of Gajubha and his family which is described in the map as `Manubha Ramsang's utara' (Manubha is the father of this witness and the deceased), was hardly 200 feet away from the house of Gajubha. In the map exh.37, house of Gajubha is shown in the north abutting on the internal road. About sixty-two feet from that house, there is a lane in which there is a house of the accused Nos. 1 and 3 at the end. At the corner of that lane is the house of Surubha Jethubha, the rear side (`pachhit') of which falls on the said internal road and the corner where the lane and the internal road meet is the place where the first two knife blows are said to have been given by the accused No.2 Chandrasinh when Gajubha had reached there while proceeding towards his house. The mother of Gajubha who is said to have been dragged out on the street, would have been a few feet away from the spot where Gajubha was attacked. From that place, Gajubha started running back and when he came near `Chamunda Mataji's Madh' about 100 feet from the place where he was given knife blows near the `pachhit' of Surubha, there is a mark in the map, which shows the spot where another knife blow was given. Thereafter, Gajubha kept running, but he fell down at the spot which is shown in the map which is near his `utara'. From the short distances between these spots, it is clear that the incident must have taken place within a few minutes. The distance of 150 or 200 feet on this street is not a distance on the basis of which it can be said that the scene of offence was different than the one which is

suggested by the evidence adduced by the prosecution particularly when the incident spanned over more than a hundred feet of the street.

9.1 Ranubha's evidence establishes that when his mother Mayaba was being beaten around 10 o'clock by the accused Nos. 1 and 3, he immediately called Gajubha by going to the `utara' and Gajubha started rushing towards their house and while on his way, when he came near the lane adjoining the house of Surubha, the accused No.2 Chandubha emerged from there, and gave him knife blows. This would mean that Chandubha was waiting in the lane at the time when the accused Nos. 1 and 3 who were his cousin brothers had gone to Gajubha's house and had started assaulting his mother Mayaba and dragged her out in the street. After giving Gajubha two knife blows when Gajubha was trying to run away back to his `utara', the accused No.2 pursued him. The accused Nos. 1 and 3 also simultaneously started running after Gajubha with lathis and all of them overtook Gajubha and caused him other injuries, of which accused No.2 gave the third knife blow on his abdomen, while a lathi blow was given on his head.

10. Puriba in her deposition exh.12 has stated that she had seen the knife blow being given to Gajubha on his abdomen. She has stated that the incident had occurred around 10 o'clock while she was in the house, just opposite `Mataji's Madh'. Her daughter had come to tell her that Chandrasinh was beating Gajubha. She has stated that Ajitsinh and Bharatsinh were also running after Gajubha. She has stated that Bharatsinh and Ajitsinh were running after him with sticks, while Chandubha was running after him with a knife. In her cross-examination, she has stated that in her statement dated 15-5-1987, she had not stated that Bharatsinh and Ajitsinh were having sticks. It appears that her further statement was also recorded on 19-5-1987 by the investigating officer in respect of which no such contradiction is suggested. The deposition of this witness shows that while the incident was happening, she was in her house opposite `Mataji's Madh' and when Gajubha was being chased by these three accused persons, she had seen a knife blow being given by the accused No.2 to Gajubha on his abdomen at that place. To this extent, she fully supports the prosecution version.

11. Mayaba, mother of Gajubha in her deposition exh.21 has stated that around 10 o'clock, while she and her daughter were weeping at their house, the accused Nos. 1 and 3 suddenly came, opened the door and started abusing them. The accused No.1 and the accused No.3 had

beaten her and dragged her out pulling her by her hair. She has stated that Bharatsinh had gone to his house and brought two sticks. The house of Ajitsinh and Bharatsinh was just fifty feet away from her house. They gave her stick blows on her back and waist. Her daughter Harshaba tried to intervene, but she was given a push by the accused No.1 - Ajitsinh. Her son Ranubha had rushed to the `utara' to call Gajubha. Gajubha started running towards their house and while he was near Surubha's house he gave a shout as to why were they beating his mother and at that time, from the lane near Surubha's house, the accused No.2 Chandrasinh suddenly emerged with an open knife, charged Gajubha and gave a knife blow on his chest and another knife blow on the left side of his abdomen. She has stated that the rear of the house of Surubha was about 25 feet away from the place where she had fallen. She has also stated that the accused Nos. 1 and 3 started running towards Gajubha with sticks. She had seen Gajubha being hit by sticks. She has stated that while Gajubha was being beaten, Ashoksinh i.e. accused No.4 had also come from his house with a stick. This witness had at that time fallen down near Surabha's house. In her cross-examination, she has stated that her further police statement was recorded on 18/5/1987. She has stated that, in her first police statement, she had mentioned that the accused Nos. 1 and 3 were having sticks and she was beaten by the sticks. She has also stated that she has stated before the police about her being dragged out by pulling her hair. She has stated that she does not remember whether in her statement dated 14-5-1987, she had stated that the accused Nos. 1 and 3 had given stick blows to Gajubha.

11.1 From the deposition of this witness, it transpires that the accused Nos. 1 and 3 had entered the `falia' of her house, from where she was beaten and dragged out and while she was being beaten by the accused Nos. 1 and 3 by sticks, Ranubha who was at the house had rushed to call Gajubha and when Gajubha came near Surubha's house, the accused No.2 Chandrasinh emerged from the lane and gave him two knife blows and when Gajubha tried to run away back to his `utara', the accused No.2 chased him with the knife and the accused Nos. 1 and 3 also chased him with their sticks and give further injuries to Gajubha.

12. The learned counsel referring to the deposition of First Grade Head Constable - Tulasibhai which is at exh.58, pointed out from his cross-examination that he had stated that Mayaba has not stated in her police statement that the accused Nos. 1 and 3 were having

sticks and that they had beaten her son with the sticks. He had further stated that Mayaba had not stated before him that anyone had pulled her by her hair. On the basis of these omissions, it was contended that Mayaba had never stated before the police that Ajitsinh or Bharatsinh were having sticks. When it was pointed out to the learned counsel that this omission has to be read only in respect of the police statement which was given by Mayaba on 14-5-1987 and which was recorded by Head Constable Tulsibhai and that this omission cannot be read in context of the further statement of Mayaba which was recorded on 18-5-1987 by P.S.I. Navalsinh Zala and that no such omissions were proved in context of that statement, the learned counsel submitted that this Court cannot refer to the statements of these witnesses and identify as to in respect of which of the two statements the omissions or contradictions related, and the evidence should be read as it is. We will deal with this aspect later on since we have been addressed at great length by the learned counsel and the learned Advocate General also on this legal aspect of the matter.

11.1 We may note here that Tulsibhai in his deposition exh.48 states that he had recorded the statement on 14-5-1987, while P.S.I. Navalsinh in his deposition exh.60 states that he had taken over the investigation on 18-5-1987 and recorded further statements of Mayaba and others on 18-5-1987. Therefore, the contradictions and omissions which are brought on record in the evidence of Tulsibhai exh.48 obviously would relate to the statements recorded by him and cannot be attributed to the further statements of the witnesses which were recorded by the P.S.I. Navalsinh on 18-5-1987 or thereafter, in respect of which no such omissions or contradictions were suggested. In our opinion, the deposition of Mayaba fully supports the prosecution version and she appears to be a reliable eye-witness who had seen the incident of Gajubha being attacked with knife by the accused No.2 and the accused Nos. 1 and 3 with sticks as well as accused No.2 with knife chasing Gajubha when he was trying to escape further injuries by running towards his `utara' from where he had come to save his mother.

12. Harshaba, in her deposition exh.22, has stated that around 10 o'clock while she and her mother were weeping after her brother Abhesinh who was injured by a knife blow given by the accused No.4 in the morning was taken to the hospital, the accused Nos. 1 and 3 had come to their house, they had started beating her mother by fist and kick blows and her mother was dragged out of the house by pulling her hair. The accused No.3 Bharatsinh

went to his house which is nearby and brought sticks. She had intervened, but she was given a push by Bharatsinh, as a result of which she fell down. Her younger brother Ranubha who was in the house had rushed to call her brother Gajubha. When Gajubha came near the site of Surubha's house, and shouted as to why they were beating his mother, Chandrasinh, the accused No.2, emerged from the lane and gave two knife blows to Gajubha, one on his chest and the other on his abdomen. Leaving their mother Mayaba, the accused Nos. 1 and 3 started running towards Gajubha. Gajubha was chased by all the four accused. She has stated that the accused No.4 - Ashoksinh had also come there. Chandrasinh was having a knife in his hand. The accused Nos. 1 and 3 were having sticks, while the accused No.4 was having a knife which he did not use. We may note here that if this witness really wanted to falsely implicate these persons, there was greater reason to implicate the accused No.4, who had in the morning given a knife blow to her brother Abhesinh. In her cross-examiantion, she has maintained that she had seen her brother Gajubha being given knife blows. She started looking after her mother and did not follow them till the `utara'. From the map exh.37, it is clear that from outside her house, this witness would have easily seen the spot where Gajubha was attacked by the accused No.2 who emerged from the lane and she would have also seen the accused Nos. 1 and 3 chasing Gajubha while he was trying to run back to the `utara' after being given two knife blows by the accused No.2. The omissions as regards her mother being pulled by her hair from the house and about Bharatsinh going to his house and bringing sticks were put to her in context of her police statement recorded on 14-5-1987. She has denied that she had not stated in her police statement on 14-5-1987 that her mother was dragged by pulling her hair. As regards the statement of 18-5-1987, the only omission which was put to her was that she had not stated that accused No.4 Ashokbhai was having a knife. The omissions which were in her first statement taken on 14-5-1987 cannot be attributed to her further statement which was taken on 18-5-1987 in respect of which no such omissions were suggested. From her deposition, we are fully satisfied that she had witnessed the incident and she saw the accused No.2 emerging from the lane when her brother Gajubha was coming to their help while the accused Nos. 1 and 3 were beating their mother, and the accused No.2 giving two knife blows to Gajubha and also the accused Nos. 1 and 3 chasing Gajubha with lathis while he was trying to go back to the `utara'. On all material particulars, this witness fully supports the prosecution version.

13. Prasannaba Dilubha in her deposition at exh.23 has stated that her house is about 10 to 15 feet away from the house of Mayaba and she knows the accused persons. She has stated that at the time of incident around 10 o'clock, when there was commotion, she had come out near the house of Surubha and had seen the accused No.2 Chandrasinh giving two knife blows to Gajubha. She has stated that the accused Nos. 1 and 3 were having sticks.

14. Witness Tejubha in his deposition exh.25 has stated that at the time of the incident, he was sitting at the corner of the locality of Naranpa when Ranubha had come to call him and told him that his brother was being beaten. He rushed to the spot where Gajubha was lying with knife and stick blows on his person. He has stated that the accused No.2 had given knife blows, while the accused Nos. 1 and 3 had given stick blows to him and that he had seen the accused going away from a distance of about fifty feet. He had then gone to Jambha's house and brought the motorcycle on which he and Jambha had taken Gajubha to the hospital. He has maintained that he has seen the accused Nos. 1 and 3 giving stick blows to Gajubha.

15. Manubha in his deposition exh.28 has stated that, after he returned from Surendranagar where Abhesinh was admitted in the hospital after the 7.30 a.m. incident, and reached back to Muli at about 11.30 a.m., he saw that his wife Mayaba was unconscious. He was told by Harshaba that the accused Nos. 1 and 3 had pulled her out of the house by her hair and had beaten her. She also told him that these four accused persons had assaulted Gajubha. She had said that the accused No.2 Chandubha and the accused No.4 had assaulted him with knife, while the accused Nos. 1 and 3 had given stick blows on his head. He had gone to the hospital at Surendranagar. He has then stated that when he met Gajubha after 2.00 p.m. in the hospital he told him that he would not survive as he had received severe injuries. He had asked Gajubha as to who had assaulted him and Gajubha had given the names of the four accused persons and had stated that the accused No.2 had given him knife blows and the accused Nos. 1 and 3 had given him stick blows, while the accused No.4 was having a knife. He has denied the suggestion in his cross-examination that Gajubha was injured by people who had gathered in the crowd at the time when in the morning his sons Gajubha and Abhesinh were trying to beat Ashoksinh. This witness also fully corroborates the version of the eye-witness and there is nothing in his

cross-examination which would create a doubt on his deposition as to the material particulars of the prosecution case.

15. The medical evidence shows that the following injuries described in the certificate exh.30 were noticed at the time when Gajubha was examined by Dr. D.K.Wadher on 14-5-1987 :

"(1) Incised stab wound on (Rt) side chest 4th i.e space just 1.1/2 " lateral to L.B. sternum / 1.1/4" x deep to lung.

(2) Incised wound on left hypochondrium at level of 7th rib tip deep 1"

(3) Incised wound on right forearm 2.1/2" x 1/2"

(4) Incised wound on scalp to bone vertex (posterior) 3" x 1.1/2" deep "

It will be noticed that in the history noted in the certificate exh.30 by Dr. Wadher, it was mentioned that Chandubha Lalubha (i.e. the accused No.2) and family had assaulted Gajubha.

15.1 Mayaba, who was also examined at 12.55 p.m. on 14-5-1987 by Dr. Devajibhai as stated in his deposition exh.29, was having the following injuries, as mentioned in the medical certificate exh.32 :

"(1) Contusion on right side scalp temporal region size 2" x 1"

(2) Contusion left leg 3" x 1"

(3) Contusion left side scalp temporal region size 1.1/2" x 1" "

He has stated that these injuries were possible by hard and blunt substance like stick. Thus, there is positive evidence to corroborate the deposition of Mayaba that she was beaten with sticks by the accused Nos. 1 and 3.

16. As per the post mortem notes, in column No.17, the following injuries have been noticed :

"(1) Sutured wound about 5 cm long on left

parietal region.

(2) C.L.W. 3 cm x 1 cm below the previous wound.

(3) Sutured vertical wound extending (laperotomy) from xyphysternum to umbelius, 18 cm long.

(4) Sutured wound 3 cm long in right 4th intercostal space situated below and anterior to right nipple.

(5) Sutured wound over left lower part and chest in mid-clavicular line 4 cm long.

(6) Sutured wound in left 8th intercostal space, extending to lateral and posterior part of chest (operation wound).

(7) Sutured wound in 5th right intercostal space, in mid-clavicular line.

(8) Sutured wound on anterior surface of middle of right forearm 3 cm long. "

16.1 Dr. Kiritbhai Hirabhai in his deposition exh. 76 has proved the case papers exh. 77 in respect of the treatment which was given to Gajubha. He has stated that Gajubha was brought to the hospital in the evening at about 8.30 a.m. on 14-5-1987 and he had noted the four injuries, which included C.L.W. 7 cm x 1 cm on the head and three knife wounds, one on the right side of the chest, the other on the left and a fracture of the 5th rib on the chest.

16.2 It was tried to be contended on behalf of the accused that the first medical certificate described the injury on head as an incised wound, while as per the other medical evidence, it was described as a contused lacerated wound. It was submitted that the benefit of this discrepancy should go to the accused by treating it as an incised wound which could not have been caused by giving stick blows, which are attributed to the accused Nos. 1 and 3. This contention is fallacious. It has been held by the Supreme Court in Suresh v. State of U.P., reported in AIR 1981 SC 1122 in paragraph 9 of the judgement that the injuries which were found on the forehead can give the appearance of incised injuries. If caused by an iron rod, the skin just above a hard surface can break by a severe blow and give the appearance of an

incised injury.

17. The contention that if proper medical treatment was given, a person could live even with one lung and therefore, this injured who survived for four days after the injuries could have lived if he had been given proper treatment and that the injuries which were caused to him were not the immediate cause of his death and the death may have occurred due to the sepsis that had developed which could have been due to the surgical treatment which was given to him, is misconceived. It is specifically provided in Explanation 2 to section 299 of the Indian Penal Code that where the death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment, the death might have been prevented.

18. We may now consider the dying declarations exh.14 and exh.72. From these two dying declarations, it clearly transpires that the names of all the accused were disclosed by Gajubha at the earliest point of time and it was stated by him that the accused No.2 - Chandrasinh had given him knife blows, while the accused Nos. 1 and 3 had given him stick blows. He has stated that a knife knife blow was aimed at him by the accused No.4 Ashokbhai, but the blow missed him. If Gajubha really wanted to falsely implicate anyone, the accused No.4 Ashoksinh would have been his first target, because, in the morning, Ashoksinh is said to have assaulted his younger brother Abhesinh by knife and injured him.

18.1 Gajubha in his dying declaration exh.14, the recording of which was completed at 1.30 p.m., referred to the morning incident of that day. He stated that he had talked to Chandubha about the accused No.4 having beaten his brother and there was a quarrel between him and Chandubha and Chandubha gave him two knife blows, one on the right side of his chest and the other on the left, near the ribs. At that time, the accused Nos. 1 and 3 armed with sticks had come and hit him with the sticks on his head. It was stated that, earlier before this incident, his brother Abhesinh was beaten by the accused No.4 Ashoksinh by giving a knife blow. He also stated that the accused No.4 was having a knife. It is recorded in the margin of the statement that the patient was conscious at the time when it was recorded and the medical evidence also establishes that he was conscious when he was brought to the hospital as well as thereafter when his statements were recorded, as even at the time when he reached V.S. Hospital, Ahmedabad in the evening at about 8.30 p.m.

18.2 The other dying declaration exh.72 which was recorded by the Executive Magistrate who has deposed at exh.70 also discloses that when Gajubha was, around 10 o'clock in the morning of 14-5-1987, cleaning at his `utara' and starting to tether the bullocks, he asked the accused No.2, who was passing by his `utara', as to why were his brothers Abhesinh, Sukhdev and Ranubha beaten. It is stated that the boys were quarrelling in the school where they were studying together. Sukhdevsinh and Bakabhai, the accused No.4 were studying together in the Standard XIth. In their quarrel, Sukhdevsinh was beaten. Gajubha, therefore, told the accused No.2 that this should not happen. Thereupon, the accused No.2 Chandubha gave him knife blows near his `utara' and the accused Nos. 1 and 3 gave him stick blows on his head. The accused No.4 tried to give him a knife blow, but it missed him. He has stated that there were ladies around that place. He has then stated that, after assaulting him, these persons had run away. It is established from the evidence on record that Gajubha was conscious even while giving this statement and an endorsement to that effect appears below the statement. The Executive Magistrate, in his deposition, has proved this statement and has stated that Gajubha was conscious. There is absolutely no reason to doubt the genuineness of this statement.

19. The contention of the learned counsel for the accused persons was that the version in the dying declarations was different from the ocular version as regards the origin, manner, sequence and place of the incident and the part played by the accused persons. There is, in our opinion, no question of any discrepancy as regards the part played by the accused persons, because, in both the dying declarations, Gajubha had clearly attributed knife blows which were given to him, to the accused No.2, and the stick blows on his head to the accused Nos. 1 and 3. He has not attributed any blow to the accused No.4 though he has stated that the accused No.4 was having a knife.

20. In Laljit Singh v. State of U.P., reported in 2000 SCC (Cri.) 1501, where in the deposition of the eye-witness a vivid account as to how the occurrence took place was given, while in the dying declaration, a sketch as to how the accused persons arrived at the scene of occurrence and started assaulting the prosecution party was given, the Supreme Court held that it was not expected that a detailed account would be given at that stage, particularly when the person concerned himself was

severely injured and in fact, died on the next day in the hospital on account of such injuries. Therefore, all the details which may have come out in the depositions of eye-witnesses Mayaba, Harshaba, Ranubha and Puriba and others cannot be expected in the brief dying declarations which were given by Gajubha when he had suffered severe injuries and as a result of which, he was gasping for breath. The incident had occurred near the `utara' as per the ocular evidence, when he was proceeding to rescue his mother Mayaba who was being beaten by the accused Nos. 1 and 3 after being dragged out of her house, and, when he shouted as to why were they beating her, the accused No.2 emerged from the lane and gave him knife blows and the accused Nos. 1 and 3 started running towards Gajubha with the sticks. All of them chased him upto the `utara' and on the way, gave him further blows. The part played by them in assaulting Gajubha is clearly mentioned in the dying declarations. The fact that Gajubha did not state that Ranubha had come to call him, and that Mayaba was being beaten by the accused Nos. 1 and 3 would hardly create any doubt over the prosecution version. Gajubha had clearly referred to the quarrel that was existing, because of his brother Sukhdevsinh being assaulted earlier and because of his other brother Abhesinh being beaten in the very morning by the accused No.4. That was the genesis of the dispute that had arisen which gave motive to the accused persons to go to the house of Gajubha and then ultimately pounced on him when he came to the rescue of his mother causing severe injuries to him by lethal weapons which resulted in his death. Gajubha could not have known as to what had happened at his house when the accused Nos. 1 and 3 were beating his mother, because, at that time, he was at his `utara' and had to be called by Ranubha for help. Just when he reached nearer his house, he was assaulted by the accused No.2 with a knife and the accused Nos. 1 and 3 also pursued him and gave him stick blows. The distance between his `utara' and the house is hardly 200 feet and it is a street where a person can see from one end to the other. Therefore, the witnesses Mayaba, Harshaba and Ranubha would have easily seen the assault on Gajubha. On the material aspect of the part played by the accused Nos. 1, 2 and 3, there is absolutely no conflict between the version given by Gajubha and version of the eye-witnesses. As held by the Supreme Court in Marwadi Kishor Parmanand v. State of Gujarat, reported in (1994) 4 SCC 549, the evidence of witnesses has to be appreciated in a realistic manner.

21. In Narayan Chetanram Chaudhary v. State of Maharashtra, reported in (2000)8 SCC 457, it was held

that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person. The omissions in the earlier statement if found to be of trivial details, the same would not cause any dent in the testimony of the eye witness. It was held that even if there was contradiction of statement of a witness on any material point, that was no ground to reject the whole of the testimony of such witness.

22. The learned counsel contended that it was not open for this Court to look into the police statement of a witness to ascertain whether the contradiction or omission brought on record was really there or not. He submitted that no police statement can be used for any purpose in view of section 162(1) of the Code of Criminal Procedure and therefore, it cannot even be referred to by this Court. This untouchability attached to police statements has indeed taken root and became almost a blind belief that can be unscrupulously exploited for obscuring the truth. Let us therefore examine the true character of a police statement and see whether the extreme stand taken by the learned counsel that this Court cannot even look at the police statement even in respect of the purpose for which it was used at the trial under section 162 of the Cr.P.C. read with section 145 of the Evidence Act, is warranted by the provisions of section 162 of Cr.P.C.

23. Section 161 of the Cr.P.C. entitled "Examination of witness before police" provides for oral examination of a person by any investigating officer when any such person is supposed to be acquainted with the facts and circumstances of the case. Sub-section (2) of section 161 enjoins a statutory duty on such person to answer "truly all questions relating to such case put to him by such police officer". Such witness can refuse to answer only the questions the answer to which would have tendency to expose him to a criminal charge, penalty or forfeiture. To provide authenticity to the recording of statements under section 161(1), it is laid down in sub-section (3) that when the police officer reduces into writing any statement made during an examination of the witness under section 161, a `separate and true record of the statement' of each such person whose statement is recorded by him, shall be made.

24. The statutory duty cast upon a person giving statement before the police under section 161 to answer truly all questions relating to the case put to him by the investigating officer is significant, because,

whoever being legally bound by an express provision of law to state the truth (as has been provided by sub-section (2) of section 161) makes any statement which is false and which he either knows or believes to be false or does not believe to be true is said to give false evidence within the meaning of section 191 of the Indian Penal Code. While intentionally giving of false evidence in a judicial proceeding is punishable with imprisonment of either description for a term which may extend to seven years and fine in any case other than judicial proceedings, which will include the liability arising out of the breach of the statutory duty imposed on a person to tell the truth when his statement is recorded by the police officer, the person who intentionally gives such false evidence shall be punished with imprisonment of either description for a term which may extend to three years and to payment of fine as provided by the second part of section 193 of the IPC. Thus, a person who makes a statement before the police which he either knows or believes to be false or does not believe to be true commits an offence punishable under section 193 second part read with section 191 of the IPC read with section 161(2) of the Cr.P.C. under which there is express provision that such person is bound to state the truth while giving statement under section 161(1) before the police. When such witness deposes on oath before the court that he had not stated what was reduced in writing by the investigating officer under section 161(2) to which his attention was drawn, he would expose himself to a liability to be prosecuted under section 193 read with section 191 of the IPC for giving false evidence in view of the statutory duty imposed by section 161(2) to state truth in the police statement. The offence in such cases is in relation to the examination of the person by the investigating officer under section 161(1) and not in relation to any judicial proceeding in any court and therefore, the provision regarding complaint in writing by the court under section 195(1)(b) of the Cr.P.C. will not apply for prosecuting a person for giving false evidence within the meaning of section 191(1) read with section 161(2) of the Cr.P.C. Under section 161(3), the police officer is enjoined with a duty to make a "true record of the statement of each person whose statement he records". Therefore, if a police officer does not make a true record of the statement i.e. either adds something in the statement which is not said by the witness or omits therefrom something that he may have said or does not correctly take down the statement, he commits a breach of his duty and would be liable for a gross misconduct in discharge of his duties besides exposing himself to criminal

liabilities including for the offence of fabricating false evidence, as defined in section 192 of the IPC which is punishable under section 193 when it is fabricated for the purpose of being used in any stage of a judicial proceeding with imprisonment of either description for a term which may extend to seven years and fine. The instances where the witnesses making statements before the police officers under section 161(1) of the Code resile or cases in which it appears that the police officer concerned had not made a true record of the statement under section 161(1) or had made the record containing a false statement which was not in fact made by the witness or omitted the statements made, must be brought to the notice of the Head of the Department and the State Government so that proper check is maintained and appropriate action is taken when called for. If the witnesses and police officers are educated on these aspects of their liability, the witnesses would be less erratic in their responses and the investigating agency will act with greater responsibility.

25. The purpose for and the manner in which a police statement recorded under section 161 can be used at any trial are indicated in section 162 of the Code. The embargo against the use of the statement applies in respect of the offence under investigation at the time when such statement was made, meaning thereby that such statement can be used at the trial arising of such investigation only as provided in the proviso to section 162(1). Section 162(1) of the Cr.P.C. reads as under:

"Section 162(1) :

No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the

permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 18972 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

25.1 Thus, at the trial, part of such statement made before the police during the investigation of the offence to which the trial relates can be used for the purpose of contradicting the witness who made that earlier statement. The manner in which this can be done is incorporated by referring to the provision of section 145 of the Evidence Act, which reads as under :

"145. Cross-examination as to previous statements in writing -

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

26. Under the Explanation to section 162, an omission to state a fact or circumstance in the police statement may amount to contradiction if it appears to be significant and otherwise relevant having regard to the context in which such omission occurs. Whether an omission amounts to a contradiction in the particular context is a question of fact. Since the statement made by a witness before the police under section 161(1) can be used only for the purpose of contradicting such witness on what he has now stated at the trial as laid down by the proviso to section 162(1), only the latter part of section 145 of the Evidence Act which lays down the manner in which a witness can be contradicted is applicable in context of section 162(1) of the Code. The proviso to section 162(1) allows such use of the police statement "if duly proved". This means that the record should show that the police statement which is sought to be used for contradicting the statements made by such witness in his deposition in cross-examination was a

statement duly proved to have been made by him. When the attention of the witness is drawn to such previous statement before the police and he admits the making of the statement, it would be duly proved to have been made. If the making of it is disputed by the witness, then it has to be proved through the investigating officer that it was the statement of such witness recorded under section 161(1) of the Code.

27. Under section 145 of the Evidence Act, when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be proved. The idea behind this provision is to enable the witness to explain his statement in the deposition which is to be contradicted by his previous statement. The parts of the police statement to which attention is so drawn can now be proved and read in evidence. A part of police statement can thus be used for the purpose of contradicting the witness deposing at the trial. While recording the deposition of a witness, it, therefore, becomes the duty of the trial Court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. This necessarily would entail referring to the police statement for the purpose of drawing the attention of the witness to that part of the police statement with which he is to be contradicted. The process of bringing such part of the police statement to the attention of the witness would involve correctly indentifying that part from the police statement. The attention of witness is drawn to that part, and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and it will be read while appreciating the evidence. If he refuses to have made that part of the statement, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. When it is the duty of the trial court to ensure that the attention of the witness to the part of his police statement with which he is to be contradicted is drawn in his cross-examination, it follows that such part must be correctly reproduced in his cross-examination and duly proved, when disputed, in the evidence of the investigating or authorised officer.

All this necessarily involves referring to and reading of the police statement. It is within the ambit of the powers of the appellate Court to consider whether the process of confronting the witness with the part of his police statement was correctly followed during the trial and for this purpose, the police statements which are amongst the miscellaneous record and were used at the trial for the purpose of contradicting can always be referred and read in order to ascertain whether the part of the police statement with which the witness was to be contradicted was correctly shown to him or not. It is within the ambit of the appellate jurisdiction of this Court to verify from the record whether any error has crept in the trial in the process of confronting the witness with a part of the police statement with which he was required to be confronted.

28. In cases of contractions which are not omissions, the process is simply of checking up the part which was purported to have been brought to the attention of the witness as reproduced in his cross-examination from the police statement from which it was shown to him and by comparison, the court can ascertain whether there is any error. The part of the police statement with which the witness is contradicted is already proved by the investigating officer and forms part of the evidence and can always be read to find out whether the part which is referred in the cross-examination for drawing the attention of that witness is the same.

28.1 In cases where omission amounts to contradiction, the omission in the police statement of the witness is required to be put in his cross-examination under section 145 (second part) of the Evidence Act read with section 162(2) and the Explanation to section 162 by drawing his attention to the fact that what he is now stating at the trial was not stated by him in the police statement. This process necessarily entails the reading of the entire police statement and if the omission brought to the attention of the witness is admitted, then it stands proved, otherwise, it will have to be proved in the evidence of the investigation agency, where again the process of referring and reading the police statement takes place. The omission to state a fact or circumstance in the police statement which appears to be significant and is relevant having regard to the context in which such omission in the police statement occurs may amount to contradiction, as provided by the Explanation to section 162 of the Cr.P.C. Thus, only material omissions which amount to contradiction can be proved at the trial. For finding out whether there is such

omission (as was put to the witness) proved, one has necessarily to read the police statement from which the omission was to be proved. Whether the omission exists and was duly proved at the trial is a matter which can be considered by the appellate Court and such consideration would involve and justify referring to the police statement to ascertain whether the provisions of section 145 of the Evidence Act read with section 162(2) and the Explanation to section 162 of the Cr.P.C. have been duly observed by the trial Court, and whether the omission really is there or not. Albeit, the exercise of power by the appellate Court is circumscribed by the provision of section 162 about the purpose for which any part of a police statement can be used at the trial. However, within the above permissible limits, the appellate court is empowered to verify the material which forms part of the evidence by virtue of the attention of the witness being drawn to that material in his cross-examination under section 145 of the Evidence Act to contradict him and the proof of such contradiction or omission as adduced at the trial. One has necessarily to read that portion of the statement which is used for contradiction and which is said to be duly proved in order to decide whether it really was duly proved. It would, therefore, be too naive to suggest that the appellate Court cannot even refer to or read that part of the police statement which has already been used for the purpose of contradicting the witness, for deciding whether any error is committed in drawing the attention of the witness to that part in his cross-examination as required by section 145 of the Evidence Act read with section 162 (1) of the Code and whether such part was duly proved in the deposition of the investigating officer, if disputed by the witness.

29. In the present case, the statements of the eye witnesses were recorded by the police officers twice, first on 14-5-1987 and again after the death of the injured on 18-5-1987 and thereafter. While cross-examining the First Grade Head Constable Tulsibhai exh.23 for proving the contradictions or omissions in the police statements of the eye-witnesses, they are sought to be proved merely by a general reference to the police statement of the witnesses without specifying whether the contradiction or omission was being put in the context of the first statement recorded on 14-5-1987 or the further statement of the witness recorded on 18-5-1987. An impression can, therefore, be generated, as has been successfully done before the trial Court, that such contradiction or omission refers to all the police statements of the witness though in reality what was put

to the witness in his cross-examination was the contradictions or omissions in the first statement recorded on 14-5-1987 and there were no such contradictions or omissions suggested to the investigating officer in respect of the subsequent police statement of that witness. It would, therefore, become necessary in such cases to ascertain whether the contradiction or omission which was sought to be proved was in the context of the first statement of the witness or his further statement. Witness may have omitted in his first statement to the police what he stated in the subsequent one when two police statements were recorded of that witness and in such cases, the evidence recorded must show from which statement the part to be used for contradiction or omission, as the case may be, was put in the cross-examination and was proved by the investigating officer. When it is left nebulous in the deposition of the investigating officer whether he deposes regarding the contradiction or omission in respect of one or the other or both the police statements of the witness, whose more than one police statements were admittedly recorded and were produced in the record of the proceedings before the trial Court, the Court can always ascertain from the record whether the contradiction or omission proved is with reference to the first or the subsequent or both the statements made before the police by that witness. This verification of the record will not amount to using the police statements of that witness for any purpose other than the purpose of contradiction by a duly proved part of the police statement or when it is a case of omission amounting to contradiction for ascertaining whether the omission as contemplated by the Explanation to section 162 of the Code really existed and was duly proved as per the second part of section 145 of the Evidence Act read with section 162 of the Cr.P.C.

30. In the present case, two different police officers had recorded the statements of witnesses. After the investigation was taken over by the P.S.I. Navalsinh Zala on 18-5-1987, when Gajubha died, he had recorded the further police statements of the eye witnesses. Obviously therefore, in their cross-examination, when they were asked about the contradiction or omission that was in the context of the statement recorded by the concerned investigating officer. There are hardly any contradictions or omissions brought on record in context of the further statements of the eye witnesses which were recorded on 18-5-1987 by the P.S.I. Zala in his deposition. When more than one statements are recorded by the investigating officer, the contradictions and omissions occurring in one statement cannot be attributed

to the other statement in the context of which no such contradictions or omissions are proved.

31. The statements recorded on 14-5-1987 were recorded at the time when Gajubha was injured, but living, while the statements taken on 18-5-1987 were recorded after his death by the P.S.I. Zala who took over the investigation from the First Grade Head Constable Tulsibhai. Under section 161(1) of the Code, a police officer has power to examine orally any person supposed to be acquainted with the facts and circumstances of the case and such person is bound to answer truly all questions relating to such cases put to him by such officer, as provided by sub-section (2) of section 161 of the Code. Therefore, the factum of omission will depend on what questions are put by the police officer while examining the witness under section 161(1) which such witness is bound to answer truly under sub-section (2) of section 161 of the Code. The First Grade Head Constable Tulsibhai had taken the statements on 14-5-1987 when the offence was registered under section 326 etc. of the Indian Penal Code. in respect of the knife injuries caused to Gajubha, but the P.S.I. took over the investigation when the injured died on 18-5-1987, as a result of which, the offence of murder was registered against these accused persons. Therefore, the questions put by the P.S.I. in the further statements of the eye witnesses would be for eliciting greater details in respect of the offence of murder. Thus, a witness cannot be condemned when his more detailed examination is undertaken by the investigating officer in the further statement after the offence of murder was registered for any omissions in his earlier statement during which detailed questions may not have been put by the police officer, as, at that time, the police officer was the Head Constable who was investigating the offence of injuries by sharp cutting instruments and not of murder. The omissions in the first statement recorded on 14-5-1987 of certain minute details would hardly be relevant when from the further statement of that witness under section 161(2) of the Code recorded on 18-5-1987, there are no such omissions proved. There is, therefore, no substance in the contention raised on behalf of the accused persons that the eye witnesses have made improvements in their version before the Court to rope in the accused persons.

32. The version that Gajubha had proceeded towards his house on being called by Ranubha and was inflicted knife blows when he came near the rear side of Surubha's house is corroborated by important circumstantial

evidence of the finding of the blood on the sheath which was recovered from that spot which was of group `O' being the blood group of the deceased Gajubha, as has been proved from the panchnama of the scene of the offence exh.28 drawn on 14-5-1987 at 7.00 p.m. and proved in the deposition of panch Balubhai ex.56 who was not even cross-examined, and the report of the Serologist at exh.64 showing that the said sheath was having blood of `O' group which was of the deceased as established from group `O' of the blood stains on his clothes which were also forwarded for analysis. The report exh.64 shows that both the chappals recovered from that very spot were also having human blood. The scrappings recovered from the wall of `Mataji's Madh' near which the third knife blow was given to Gajubha by the accused No.2 who was chasing him alongwith the accused Nos. 1 and 3 had overtaken him, were also found to be having the blood of `O' group, in the report exh.64. This is an important circumstance which corroborates the version of the eye witness that Gajubha was attacked when he came near the house of Surubha by the accused No.2, who gave him two knife blows there and that Gajubha, therefore, started running back to his `utara' when he was chased by the accused No.2 with knife and the accused Nos. 1 and 3 with sticks in their hands, and further assaulted near `Mataji's Madh' by the third knife blow given by the accused No.2 on his abdomen. Even according to the eye witnesses, the accused continued to chase him further and the accused Nos. 1 and 3 gave him lathi blows causing the injury on his head, which is corroborated by the medical evidence. Since the accused persons had chased Gajubha till he fell near his `utara', the version of Gajubha shorn of all details in his dying declaration speaks of his being attacked by the accused persons near his `utara' where in fact he had fallen down. The distance between the `utara' and his house was hardly 200 feet and his mother was dragged out of the house while he too had come out of his `utara' on the same street, and this obviously suggest that the incident of attack on Gajubha started near the lane adjoining Surubha's house as stated by the eye witnesses and ended near the `utara' upto which Gajubha was chased and further assaulted and when he fell down because of the injuries. The version of the eye witnesses establishes beyond any shadow of doubt that the incident started when Gajubha was coming towards his house from his `utara' and had reached near Surubha's house and the incident continued when he tried to save himself from further assault by running back towards his `utara' and while doing so, he was again given a knife blow on his abdomen near the wall of `Mataji's Madh' and lathi blows which caused him the head

injury, and that he ultimately fell down near his `utara'. There is, therefore, no substance in the contention that the dying declaration of Gajubha destroys the ocular version or that the stories are different. The severely injured Gajubha could not have been expected to give a detailed account of the incident at that time about Ranubha having come to call him and having told him that the accused Nos. 1 and 3 were assaulting Mayaba, more so because he had not seen the initiation of such assault on Mayaba and was not expected to give such details when he was giving the dying declaration in a precarious state of health. In any view of the matter, there is no inconsistency in the version of Gajubha appearing in his dying declarations and the version of the eye witnesses. The evidence of the eye witnesses is absolutely reliable and establishes the guilt of the accused no.2 as well as the accused Nos. 1 and 3 beyond any reasonable doubt. The learned trial Judge has erroneously appreciated the evidence on record for acquitting the accused Nos. 1 and 3 while rightly holding the accused No.2 guilty of the offence under section 302 of the Indian Penal Code. Even the learned trial Judge did not rule out the presence of the accused Nos. 1 and 3 and merely held that their having lathis was not enough to implicate them ignoring the reliable evidence of the eye witnesses Mayaba, Harshaba and Ranubha and the dying declarations which also establish their role in assaulting Gajubha with lathis as well as medical evidence showing a contused lacerated wound on the head of Gajubha which could be caused by a stick blow and three injuries on Mayaba which were as per the medical evidence possible by stick blows. The trial Judge has failed to notice that there were no material contradictions or omissions as assumed by him in the deposition of the eye witnesses who could not have been so lightly discarded on the question of involvement of the accused Nos. 1 and 3. We may recall the ratio of the decision in Marwadi Kishor Parmanand v. State of Gujarat, reported in (1994) 4 SCC 549, in which it was held by the Supreme Court that the evidence of a witness deposing about a fact has to be appreciated in a realistic manner having due regard to all the surrounding facts and circumstances prevailing at or about the time of occurrence of an incident. Some contradictions and omissions even in the evidence of a witness who was actually present and had seen the occurrence are bound to occur even in the natural course. It is a sound rule to be observed that where the facts stated by an eyewitness substantially conform to and are consistent on material points from the facts stated earlier to the police either in FIR or case diary statements and are also consistent

in all material details as well as on vital points there would be no justification or any valid reason for the court to view his evidence with suspicion or cast any doubt on such evidence.

33. The finding of the trial Court that nothing was brought in the evidence to show that there was prior meeting of mind, a prearranged plan and all the accused acted in furtherance of common intention of all is wholly erroneous and such as no reasonable mind will reach on the basis of the evidence on the record of this case.

33.1 Ordinarily, there cannot be any direct evidence of the process of formation of common intention. The common intention is to be culled out from the facts and circumstances of the case established by the prosecution. In state of State of Haryana v. Tej Ram, reported in AIR 1980 SC 1496, where two accused who were brothers were alleged to have murdered the deceased by attacking him with pharsa (sharp edged weapon) and lathi respectively at the dead hours of night, and the High Court maintained the conviction of the accused who was armed with pharsa, but acquitted the other accused who was armed with a lathi though holding, that both the accused persons were present at the time and place of occurrence, that both had repeatedly come to the house of the deceased and were nursing a grudge against the deceased, that they came armed to the house of the deceased and made a concerted assault on the deceased and the injuries on the body of the deceased revealed that they were caused by a sharp edged weapon as well as a blunt weapon, the Supreme Court held that in the circumstances that the accused armed with lathi could not be acquitted on the ground that he did not attack the deceased or that he had no common intention to commit murder. It was held that he was also liable to be convicted under section 302 read with section 34 of the I.P.C.

33.2 As noted above, in the present case, there is cogent and reliable material on the basis of which the Court can arrive at the finding that the accused Nos. 1 and 3 shared common intention of causing murder of Gajubha alongwith the accused No.2. It is a settled legal position that the common intention can develope even during the course of occurrence (Sheoram Singh v. State of U.P. reported in AIR 1972 SC 2555).

33.3 In Brijlala PD. Sinha v. State of Bihar, reported in (1998) 5 SCC 699, it was held that the liability of one person for an offence committed by

another in the course of a criminal act perpetrated by several persons will arise under section 34 of the Indian Penal Code only where such criminal act was done in furtherance of a common intention of the persons who join in committing the crime. It was held that direct proof of common intention will, of course, be difficult to get and such intention can only be inferred from the circumstances. It was held that the common intention can develop at the spur of moment.

33.4 In Sheoram Singh v. State of U.P. reported in AIR 1972 SC 2555, it was held that the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit the offence with which they could be convicted. The prearranged plan may develop on the spot during the course of the commission of the offence, but the crucial circumstance is that the said plan must appreciate the act constituting the offence.

34. In the present case, these accused had ample opportunity to form their common intention to assault Gajubha and his family members. In the morning, the incident had taken place at 7.30 a.m. between the accused No.4 and Abhesinh, younger brother of Gajubha, which had resulted in a knife blow being given to Abhesinh for which he had filed an FIR exh.55 at 9.30 a.m. and was taken to the hospital at Surendranagar. Manubha had also gone to Surendranagar. All the accused were closely related. The accused Nos. 1 and 3 had their house in the lane near Surubha's house and the accused No.2 had emerged from that very lane when the incident rapidly occurred indicating that he was waiting in the lane at the time when the accused Nos. 1 and 3 were assaulting Mayaba. The accused No.2 is the real brother of the accused No.4, against whom the FIR exh.55 was lodged at Muli police station and Anadubha, the father of the accused Nos. 1 and 3, was the co-accused in that FIR. This obviously must have infuriated these accused Nos. 1, 2 and 3 and they had sufficient motive to commit the offence. The concerted manner in which the accused No.1 and 3 barged with sticks into the courtyard (i.e. Dela) of the house of Gajubha and assaulted his mother dragging her out in the street, while the accused No.2 was waiting in the lane which had at its dead end the house of the accused Nos. 1 and 3, as is clearly seen from the map exh.37 prepared by the Circle Inspector, and on Gajubha's coming near the lane, the accused No.2 pounced on him and inflicted two knife blows on the vital parts of his body and the further fact that, on seeing that happening, the accused Nos. 1 and 3 left

Mayaba whom they were assaulting and ran after Gajubha with their sticks and pursued him even while the accused No.2 dealt yet another knife blow on his abdomen near the wall of `Mataji's Madh', and that they gave stick blows causing injury on the head of Gajubha pursuing him till he fell down near his `utara' and after inflicting serious injuries to Gajubha, they all ran away together, are the facts which unequivocally establish that the accused Nos. 1 and 3 shared the common intention with the accused No.2 to murder Gajubha. No elaborate design was required, and, the time and manner of the collective and planned assault, the nature of injuries caused and their escape together, lead to the only possible inference that the accused Nos. 1 and 3 also shared the common intention with the accused No.2 to commit the murder of Gajubha. The evidence also clearly establishes that the accused Nos. 1 and 3 had made a concerted effort by starting the attack on Mayaba and that they had dragged her out of her house and gave stick blows to her. They are therefore also guilty of the offence under section 323 read with section 34 of the I.P.C. for causing injuries to Mayaba in furtherance of their common intention.

35. We, therefore, hold that the accused No.2 is rightly found guilty of the offence under section 302 of the Indian Penal Code. We hold that the accused Nos. 1 and 3 are guilty of the offence under section 302 read with section 34 of the Indian Penal Code and section 323 read with section 34 of the Indian Penal Code. We, therefore, while upholding the conviction and sentence of the accused No.2 Chandrasinh @ Chandubha Lalubha, and dismissing his appeal (Criminal Appeal No. 652 of 1990), allow the acquittal appeal (Criminal Appeal No. 790 of 1990) against the respondents Nos.1 and 2 who are the original accused No.1 - Ajitsinh Anadubha Parmar and accused No.3 - Bharatsinh Andubha Parmar, and convict them for the offence under section 302 read with section 34 of the Indian Penal Code and also for the offence under section 323 read with section 34 of the Indian Penal Code.

36. We have heard the learned Additional Public Prosecutor and the learned counsel for the original accused No.1 and 3 on the question of sentence. The accused Nos. 1 and 3 are on bail and during the hearing of these appeals, though asked by the Court, they have not remained present. Their learned counsel has submitted that this is a case which would call only for minimum penalty for the offence under section 302 read with section 34 of the Indian Penal Code, and therefore,

their presence is not necessary.

37. We, accordingly, pass the following order :

:: ORDER ::

[A] Criminal Appeal No. 652 of 1990 of the appellant - original accused No.2 - Chandrasinh @ Chandubha Lalubha is dismissed.

[B] (i) Criminal Appeal No. 790 of 1990 filed by the State against the acquittal of the respondent No.1 - original accused No. 1 - Ajitsinh Andubha and the respondent No.2 - original accused No. 3 Bharatsinh Andubha is allowed and they are convicted for the offence under section 302 read with section 34 of the Indian Penal Code and each of them is sentenced to suffer imprisonment for life, and to pay a fine of Rs.100=00, in default of payment of which to suffer rigorous imprisonment for 15 days.

(ii) The original accused No. 1 - Ajitsinh Andubha and original accused No. 3 Bharatsinh Andubha are also convicted for the offence under section 323 read with section 34 of the Indian Penal Code and each of them is sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.100=00, in default of payment of which to suffer rigorous imprisonment for 15 days.

(iii) The sentences of imprisonment shall run concurrently.

(iv) The learned counsel for the original accused No. 1 - Ajitsinh Andubha and original accused No. 3 Bharatsinh Andubha prays that the accused Nos.1 and 3 be given time to surrender. This request cannot be accepted. They shall be taken in custody forthwith.

JULY 6, 2001 [R.K.ABICHANDANI, J.]

[SHARAD D. DAVE, J.]

parmar*